MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

LANSING

MICHIGAN 48918

1-85-LD

April 16, 1985

Mr. Roy Smith
7768 Munger Road
Ypsilanti, Michigan 48197

Dear Mr. Smith:

This is in response to your request for a declaratory ruling with respect to whether the lobby act, 1978 PA 472 (the Act), precludes you from lobbying on behalf of E.R.I.M., a non-profit corporation.

In your letter the issues of concern are set forth as follows:

> "I have been approached by E.R.I.M., a scientific non-profit corporation, to assist said agency in securing clarifying legislation defining its tax exempt status.
>
> Because I find confusion in the law I am asking for a declaratory ruling on the following issues:
>
> 1. As an elected member of the Washtenaw County Board of Commissioners, would I come under one of the exceptions in Section 11 of the statute in that this is neither a full-time position nor am I pronibited from taking outside employment.
>
> 2. Because Washtenaw County could benefit in tax revenues if E.R.I.M. were placed on the tax roll, would my assisting them in attaining clarification legislation, the end result of which would be to exempt them from taxation, be considered a conflict of interest?
>
> 3. Are there any other rules or regulations promulgated by the Secretary of State which would prohibit me from registering as a lobbyist for the above named corporation?"

The Act sets forth a comprehensive definition of lobbying in section 5(2) (MCL 4.415) which includes direct communications with public officials aimed at influencing legislative or administrative action. However, the only persons who

are required to register and report are those who lobby for compensation or reimbursement.

In a telephone conversation subsequent to your letter you indicated to one of my staff that you do not receive any compensation or reimbursement for the lobbying activities described in your letter. The prohibitions of section 11 likewise apply to those who lobby for compensation or reimbursement. In short the Act does not apply to those individuals who do not spend or receive money to engage in lobbying.

The second issue you raise is outside the scope of the Act. Conflicts of interest are not regulated by the Department of State. For advice on this issue you should contact your county's corporation counsel or your own private attorney.

Your third concern is whether the Department of State has promulgated rules which would prohibit you from registering as a lobbyist agent for the corporation. As previously indicated the Act does not prohibit registration by a person who engages in lobbying. Only those who lobby for money are required to register as lobbyist agents.

This letter constitutes a declaratory ruling concerning the applicability of the Act to the statement of facts set forth in your request.

Very truly yours.

Richard H. Austin
Secretary of State

RHA/cw

1-85-LI

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

LANSING
MICHIGAN 48918

May 6, 1985

John F. Cavanagh
House Democratic Staff
Michigan House of Representatives
Lansing, Michigan 48909

Dear Mr. Cavanagh:

This is in response to your inquiry concerning applicability of the lobby act (the Act), 1978 PA 472, to the following situation:

> "Several lobbyist agents, some representing multiple lobbyists, pool their resources for the purpose of hosting a reception for a public official in the executive branch. The reception will feature food and beverage and it is anticipated that public officials in the legislative branch will be in attendance."

You ask "what reporting requirements are triggered by virtue of the pooling of resources and the attendance of legislative public officials."

Lobbyists and lobbyist agents are required to file disclosure reports on January 31 and August 31 of each year. Pursuant to section 8(1)(b) of the Act (MCL 4.413), the reports must include expenditures for food and beverage provided to public officials, advertising and mass mailing expenses directly related to lobbying, and all other expenditures for lobbying. "Lobbying" is defined in section 5(2) of the Act (MCL 4.415) as "communicating directly with an official in the executive branch of state government or an official in the legislative branch of state government for the purpose of influencing legislative or administrative action."

Expenditures for food and beverage must be reported regardless of their purpose. Therefore, each lobbyist agent hosting the reception is required to report his or her share of the cost of food and beverage provided to officials in both the legislative and executive branches, even if lobbying does not occur at the event. The amount of detail required will depend upon the number of officials in attendance and whether the lobbyist agent has reached the expenditure thresholds established in section 8(2) of the Act.

Section 8(2) provides:

> Sec. 8. (2) Expenditures for food and beverage provided a public official shall be reported if the expenditures for that public official exceed $25.00 in any month covered by the report of $150.00 during that calendar year from January 1 through the month covered by the report. The report shall include the name and title or office of the public official and the expenditures on that public official for the months covered by the report and for the year. Where more than 1 public official is provided food and beverage and a single check is rendered, the report may reflect the average amount of the check for each public official. If the expenditures are a result of an event at which more than 25 public officials were in attendance, or, are a result of an event to which an entire standing committee of the legislature has been invited in writing to be informed concerning a bill which has been assigned to that standing committee, a lobbyist or a lobbyist agent shall report the total amount expended on the public officials in attendance for food and beverage and shall not be required to list individually. In reporting those amounts, the lobbyist or lobbyist agent shall file a statement providing a description by category of the persons in attendance and the nature of each event or function held during the preceding reporting period."

Enclosed are copies of forms entitled "Financial Report Summary" and "Food & Beverage for Public Officials" which lobbyist and lobbyist agents must file with the Department. As indicated in section 8(2), if more than 25 public officials attend the reception, each lobbyist agent is required to complete part 4 of the Food & Beverage report, describing the nature of the event, the category of persons attending, the date, and the amount expended. While the lobbyist agent need not identify the public officials in attendance, their names must be included in the lobbyist agent's records pursuant to section 9(1)(b) of the Act (MCL 4.419).

If less than 25 public officials appear at the reception, the lobbyist agent may divide his or her food and beverage cost by the number of officials attending. The lobbyist agent must then complete part 3 of the Food & Beverage report, identifying each public official who has been the beneficiary of food and beverage expenditures exceeding $25.00 in one month or $150.00 during the calendar year.

Finally, if less than 25 public officials attend and the lobbyist agent has not reached either the $25.00 or $150.00 threshold for a particular public official, the cost of the food and beverage must be reported in part 7a of the Financial Report Summary.

Other expenditures relating to the reception are reportable only if they are for the purpose of lobbying. For example, if a lobbyist agent communicates with a legislator or other public official at the event for the purpose of influencing

legislative or administrative action, the lobbyist agent must report any compensation or reimbursement received for the time spent lobbying. However, the reception itself is not lobbying and costs associated with the event, other than for food and beverage, are not reportable unless they are for the purpose of influencing a public official's action.

This response is informational only and does not constitute a declaratory ruling.

Very truly yours,

Phillip T. Frangos/jp

Phillip T. Frangos
Director
Office of Hearings and Legislation

PTF/cw

Enc.

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

LANSING
MICHIGAN 48918

October 15, 1985

Fred R. Parks
Executive Director
Michigan Corrections Organization
Local 526M
Service Employees International Union
Michigan State AFL-CIO Building, Suite 303
419 South Washington Avenue
Lansing, Michigan 48933-2172

Dear Mr. Parks:

This is in response to your request for an interpretation concerning the applicability of the lobby act ("the Act"), 1978 PA 472, to certain labor relations functions of a union representing state employees.

You state that you are employed by the Michigan Corrections Organization ("the Union"), SEIU Local 526M, AFL-CIO, which is a labor union representing employees in the state classified civil service working in Michigan's prisons. Further, you state that the Union is registered as a lobbyist under the Act, and you are registered as a lobbyist agent. Moreover, you state that you engage in various labor relations activities with the director of a principal state department; the State Employer, who is an agent of the governor, or a state commission or board. You list the labor relations functions in which you engage as follows: (1) collective bargaining; (2) labor/management meetings; (3) unfair labor practice hearings, and (4) grievance administration and arbitration.

You ask whether you are required to report these specific labor relations activities as lobbying under the Act.

The Michigan Civil Service Commission ("the CSC") was first created as a constitutional body by amendment to the Constitution of 1908 (Const 1908, art 6, §22), effective January 1, 1941. The absolute power of the CSC within the scope of authority granted by this Constitutional amendment was immediately recognized by the Michigan Supreme Court in Reed v Civil Service Commission, 301 Mich 137 (1942).

The unique constitutional status of the CSC was continued by the Constitution of 1963. Const 1963, art 11, §5 describes the powers and duties of the CSC. In particular:

> "The commission shall ... make rules and regulations concerning all personnel transactions, and regulate all conditions of employment in the classified service."

Within its scope of constitutional authority, the power of the CSC is complete, absolute and unqualified. The legislature is constitutionally prohibited from infringing upon the power of the CSC.

> "Sec. 48. The legislature may enact laws providing for the resolution of disputes concerning public employees, except those in the state classified civil service." Const 1963, art 4, §48.

The Michigan Supreme Court and the Michigan Court of Appeals have consistently held that the CSC has plenary power to regulate all conditions of employment in the state classified civil service.

The Michigan Court of Appeals in International Union of Civil Rights and Social Service Employees v Michigan Civil Service Commission, 57 Mich App 526 (1975), reiterated the line of judicial authority recognizing the plenary power of the CSC.

> "The Civil Service Commission possesses plenary power and may determine, consistent with due process, the procedures by which matters are regulated relative to employment in the state classified service. Plec v Liquor Control Commission, 322 Mich 691; 34 NW2d 524 (1948); Groehn v Corporation and Securities Commission, 350 Mich 250; 86 NW2d 291 (1957); Viculin v Department of Civil Service, 386 Mich 375; 192 NW2d 449 (1971)." Supra, p 529."

In Welfare Employees Union v Civil Service Commission, 28 Mich App 343 (1970), the Michigan Court of Appeals declared that the public employees' relation act of 1965 (MCL 423.201 et seq.) is not applicable to state employees in the state classified civil service. The Court of Appeals further stated:

> "The Michigan constitution of 1963 clearly gives the Civil Service Commission supreme power over its employees. In fact, the legislature is constitutionally precluded from enacting laws providing for the resolution of disputes concerning public employees in the classified service. Const 1963, art 4, §48. The constitutional supremacy of the Michigan Civil Service Commission with respect to state employees in the classified civil service has been consistently recognized by the Michigan Supreme Court." Supra, p 351.

Within its constitutional scope of authority, the power of the CSC extends to procedure, as well as substance. The Michigan Court of Appeals stated in Council No 11, AFSCME v Civil Service Commission, 408 Mich 385, 406 (1980):

> "The power to make 'rules and regulations covering all personnel transactions, and regulate all conditions of employment in the classified service' is indeed a plenary grant of power.
>
> * * *
>
> We do not question the commission's authority to regulate employment-related activitiy involving internal matters such as job specifications, compensation, grievance procedures, discipline, collective bargaining and job performance ... This court has said as much in Viculin v Dep't of Civil Service, 386 Mich 375; 192 NW2d 449 (1971)."

In Groehn v Corporation and Securities Commission, 350 Mich 250, (1957), the Supreme Court stated:

> "The commission may, in the performance of its constitutional functions, provide for whatever assistance (hearing boards, administrative officers, and the like) it may require for the efficient performance of its duties. But the final authority and responsibility remain its own despite these delegations, and its investigative powers in aid of its final decision remain as broad as its responsibility." Supra, p 261.

Considering the applicability of an earlier administrative procedures act (1952 PA 197) to the CSC, the Supreme Court in Viculin v Department of Civil Service, 386 Mich 375, 394 (1971) stated:

> "It is plain that if the administrative procedures act was intended to apply to the resolution of disputes in the state classified civil service, it would be in violation of this provision of the constitution." (Const 1963, art 4, §48).

The Court further noted that the legislature specifically excluded the CSC from the present administrative procedures act.

> "The administrative procedures act as amended effective July 1, 1970, specifically excludes the State Civil Service Commission from its provisions. PA 1969 No 306, effective July 1, 1970 (MCLA §24.203(2)...)." Supra, fn 16, p 393.

In OAG, 1977-1978, No 5183, p 21 (March 8, 1977), the attorney general was asked:

> "In light of Const 1963, art 11, § 5, Const 1963, art 4, §48, and certain statements in the case of Viculin v Department of Civil Service, are meetings of the Michigan Civil Service Commission governed by the provisions of the Open Meetings Act?" Supra, p 30.

The attorney general responded:

> "As a result of the restriction imposed by Const 1963, art 4, §48, I am of the opinion that the Act does not apply to meetings of the Civil Service Commission in any case concerned with the resolution of classified employee disputes. This prohibition also applies to those activities of the Civil Service Commission involving a threat of impending disputes." Supra, p 31.

Considering the unique constitutional standing of the CSC and the consistent judicial declarations of its authority and supremacy regarding conditions of employment in the state classified civil service, the legislature could not have intended that the Act apply to labor relations activities within the constitutional scope of authority of the CSC.

In your letter you indicate that you engage in certain labor relations activities with the director of a principal state department; the state employer, who is an agent of the governor, or a state commission or board. Although these persons, with whom you communicate directly on these matters, may be public officials in the executive branch as that term is defined in the Act, the labor relations activities you describe are conducted under the auspices of the CSC and pursuant to its rules and regulations. The fact that communications with public officials may take place in the course of conducting such labor relations activities cannot be construed to expand the legislature's power in this constitutionally protected area.

Consequently, (1) collective bargaining, (2) labor/management meetings, (3) unfair labor practice hearings, and (4) grievance administration and arbitration proceedings, when conducted by or on behalf of employees in the state classified civil service, are all labor relations activities within the exclusive constitutional scope of authority of the CSC. Therefore, these labor relations activities are not lobbying under the Act.

This response is informational only and does not constitute a declaratory ruling.

Very truly yours,

Phillip T. Frangos
Director
Office of Hearings and Legislation

MICHIGAN DEPARTMENT OF STATE

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STATE TREASURY BUILDING

LANSING
MICHIGAN 48918

1-86-LI

January 27, 1986

Honorable Maxine Berman
Michigan House of Representatives
P.O. Box 30014
Lansing, Michigan 48909

Dear Representative Berman:

This is in response to your letter regarding the reporting of newspaper and radio advertisements pursuant to the lobby act, 1978 PA 472 (the "Act").

Specifically, you ask about the reporting of "money expended to influence a legislator's vote via newspaper and radio ads in the legislator's district, but without direct contact with the legislator, ..."

The persons who are required to file reports pursuant to the Act are "lobbyists" and "lobbyist agents." The definitions in the Act for each are found in section 5(4) and 5(5), (MCL 4.415), as follows:

> "(4) 'Lobbyist' means any of the following:
> (a) A person whose expenditures for lobbying are more than $1,000.00 in value in any 12-month period.
> (b) A person whose expenditures for lobbying are more than $250.00 in value in any 12-month period, if the amount is expended on lobbying a single public official.
> (c) For the purpose of subdivisions (a) and (b), groups of 25 or more people shall not have their personal expenditures for food, travel, and beverage included, providing those expenditures are not reimbursed by a lobbyist or lobbyist agent.
> (d) The state or a political subdivision which contracts for a lobbyist agent.
>
> (5) 'Lobbyist agent' means a person who receives compensation or reimbursement of actual expenses, or both, in a combined amount in excess of $250.00 in any 12-month period for lobbying."

Lobbying is also defined in the Act. The relevant portions of section 5(2) provides that "lobbying" is "communicating directly with an official in the execu-

tive branch of state government or an official in the legislative branch of state government for the purpose of influencing legislative or administrative action."

The administrative rules promulgated to implement the Act add further precision to the subject by defining the term "communicating directly" in Rule 1(1)(b), 1981 AACS 4.411 to mean:

> ". . . actual verbal conversations conducted in person or transmitted by electronic means, or written communications addressed to a public official, for the purpose of influencing legislative or administrative action."

An advertisement published in a publication is a communication with all who read the publication. Even though it may name an official there is no assurance that the public official will read the communication. An advertisement in a publication of general circulation is of such an indirect nature that it does not constitute lobbying pursuant to the Act.

This response is an interpretation of the Act's provisions. It does not constitute a declaratory ruling because of the general nature of the facts outlined in the request.

Very truly yours,

Phillip T. Frangos

Phillip T. Frangos
Director
Office of Hearings and Legislation

PTF/cw

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

LANSING
MICHIGAN 48918

September 8, 1986

James P. Ludwig, President
Ecological Research Services, Inc.
P.O. Box 9
Boyne City, Michigan 49712

Dear Mr. Ludwig:

You have asked for information regarding the applicability of the lobby act (the Act), 1978 PA 472, as amended, to Ecological Research Services, Inc. (ERS). You describe the services performed by ERS as follows:

> "We are a consulting company. In a nutshell, we are hired for our ability to give advice, make scientific studies, and analyses of problems for a wide circle of clients including government agencies, private firms, foundations, individuals, and combinations of these groups. We stay in business because ERS is often retained to gather data and develop an analysis that clients can use, or direct to be used, in decisions to grant or deny permits or set policy."

You then ask a series of questions concerning the Act's impact upon you and ERS. Before addressing your specific questions, it may be useful to review the Act's general requirements.

Pursuant to section 5(4) of the Act (MCL 4.415), a "lobbyist" is any person whose expenditures for lobbying are more than $1,150 in a 12 month period, or more than $300 if the amount is expended on lobbying a single public official. According to section 5(5), a "lobbyist agent" is a person who receives compensation or reimbursement in excess of $300 in any 12 month period for lobbying. (The threshold amounts were originally $1,000 and $250. These amounts have been changed to reflect the increase in the consumer price index in Detroit pursuant to section 19a of 1986 PA 83. A list of the current threshold, fee and penalty amounts is enclosed for your convenience. These numbers will be revised again on January 1, 1987, and every year thereafter as required by section 19a of the amendatory act.)

"Lobbying" is defined in section 5(2):

> "Sec. 5. (2) 'Lobbying' means communicating directly with an official in the executive branch of state government or an official in the

> legislative branch of state government for the purpose of influencing legislative or administrative action. Lobbying does not include the providing of technical information by a person other than a [lobbyist agent] or an employee of a [lobbyist agent] when appearing before an officially convened legislative committee or executive department hearing panel. As used in this subsection, 'technical information' means empirically verifiable data provided by a person recognized as an expert in the subject area to which the information provided is related."

Other definitions significantly narrow the Act's regulatory reach. As indicated above, a communication is lobbying only if it is made directly to a public official and is intended to influence legislative or administrative action. "Administrative action" and "legislative action" are defined in section 2(1) (MCL 4.412) and section 5(1), respectively, as follows:

> "Sec. 2. (1) 'Administrative action' means the proposal, drafting, development, consideration, amendment, enactment, or defeat of a nonministerial action or rule by an executive agency or an official in the executive branch of state government. Administrative action does not include a quasi-judicial determination as authorized by law.
>
> Sec. 5. (1) 'Legislative action' means introduction, sponsorship, support, opposition, consideration, debate, vote, passage, defeat, approval, veto, delay, or an official action by an official in the executive branch or an official in the legislative branch on a bill, resolution, amendment, nomination, appointment, report, or any matter pending or proposed in a legislative committee or either house of the legislature. Legislative action does not include the representation of a person who has been subpoenaed to appear before the legislature or an agency of the legislature."

Subsections (9) and (10) of section 5, when read in conjunction with the above definitions, indicate that officials in the executive and legislative branches are persons who possess policymaking authority. As you know, the Department has compiled a list of individuals who are considered public officials for purposes of the Act. A copy of the most recent list is enclosed for your convenience. This list was compiled after the enactment of 1986 PA 83, which significantly reduced the number of persons who can be lobbied in the executive branch by removing members of most state boards and commissions from the definition found in section 5(9).

Thus, in general, ERS is subject to the Act's registration and reporting requirements only if it 1) makes expenditures of more than the threshold amount 2) to communicate directly with an official in the executive or legislative branch 3) for the purpose of influencing legislative or administrative action. Similarly, you and other ERS employees must register and file reports as lobbyist agents only if you are compensated or reimbursed more than $300 for directly attempting to influence public officials. Communications with persons in state government who are not public officials are outside the scope of the

Act.

This general overview provides a basis for discussing your specific questions, which are set out below in bold print. The discussion following each question is strictly limited to the information provided.

> "I. A private client interested in obtaining a permit to construct a marina enclosing public waters comes to ERS requesting this firm to prepare an Environmental Impact Assessment (EIA) of the proposed action. Once prepared, the assessment is submitted to the DNR staff or Michigan Environmental Review Board as part of permit supporting documents. The EIA includes data, interpretation of these data, and conclusions about the project vis a vis the applicability of the state law (PA 346 of 1972). Later the client requests twice that I meet with him and DNR permitting and policy staff to serve as a resource person to explain data, interpretations, or other opinions germane to the question of granting a permit to build the marina as proposed and modified."
>
> "a) Does the preparation and submission of an EIA or EIS document constitute lobbying? Is the cost to prepare the document to be reported? If so, should the report come from ERS or the applicant for the permit?"

There is no mention in your hypothetical of an "EIS" document. According to the facts provided, an Environmental Impact Assessment (EIA) was prepared for and delivered to a private client and not to a public official. Therefore, ERS' preparation and submission of the document is not lobbying because ERS did not directly communicate with a public official.

Your remaining questions cannot be answered without additional information. In general, the permit applicant would not be subject to the Act unless: 1) the EIA was given directly to a public official (according to section 5(9) and the enclosed list, members of the Michigan Environmental Review Board are not public officials), and 2) the purpose of submitting the report was to influence the official's administrative action.

It should be noted that pursuant to section 2(1), "administrative action" does not include quasi-judicial determinations. The Department has previously stated that whenever an adversarial administrative matter has been commenced and is slated for resolution through the administrative hearing process, the exemption found in section 2(1) applies. If DNR's permit application process is quasi-judicial in nature, the Act would not apply to communications between the applicant and agency officials.

Finally, you should be apprised of rule 1(1)(d)(iv) of the administrative rules promulgated to implement the Act (1979 AC R4.411). This rule provides:

> "Rule 1. (1) As used in the act or these rules:
> (d) 'Expenditures related to the performance of lobbying' and 'ex-

penditures for lobbying' includes all of the following expenditures of a lobbyist or lobbyist-agent:

(iv) An expenditure for providing or using information, statistics, studies, or analysis in communicating directly with an official that would not have been incurred but for the activity of communicating directly."

Pursuant to this rule, if your client is engaged in lobbying, it would have to report the amount paid to ERS for compiling the EIA only if a decision to lobby had been made prior to commissioning the study. If the EIA was initially prepared for a non-lobbying purpose, no reporting is required. Thus, in the circumstances you describe, costs associated with preparing the EIA would have to be reported - if at all - by the permit applicant and not by ERS.

"b) If the client requests my presence as a resource person during meetings that may influence the decisions reached on either permits or policies, is this lobbying? If so, do I report only the time spent in these meetings that the client paid for? Or does this ipso facto convert the EIA into a lobbiest (sic) document making all those expenditures lobbying expenses? Should our client be the one reporting these items rather than ERS?"

Again, lobbying occurs only if you directly communicate with an official in the executive branch for the purpose of influencing administrative action. You are subject to regulation under the Act if, as a resource person, you are compensated or reimbursed more than $300 to communicate with an official in an effort to influence administrative action as defined in section 2(l). The fact that you are invited to participate in the meeting is immaterial.

The $300 threshold is calculated pursuant to rule 22 (1979 AC R4.422) which provides:

"Rule 22. For the purpose of determining whether a person receives compensation or reimbursement for actual expenses, or both, in a combined amount in excess of [$300.00] in any 12-month period for lobbying, the following compensation and reimbursement shall be combined:
(a) Reimbursement for expenditures made on behalf of a public official for the purpose of influencing legislative or administrative action.
(b) Reimbursement for expenditures, other than travel expenses, made to influence legislative or administrative action.
(c) Compensation received for that portion of time devoted to lobbying.

If it is determined that you meet the threshold amount, section 8 of the Act (MCL 4.418) requires you to file disclosure statements on January 31 and August 31 of each year. Copies of section 8 and a disclosure statement are enclosed for your convenience.

In general, a lobbyist agent must report any expenditures he or she makes in the following categories: 1) expenditures for food and beverage provided to public officials; 2) advertising and mass mailing expenses directly related to lobbying; and 3) all other expenditures for lobbying. A lobbyist agent is not required to report the amount of compensation or reimbursement received for lobbying. That amount is reported by the lobbyist (the permit applicant, if in fact lobbying occurs) as an expenditure for lobbying.

Issues relating to the EIA are addressed in the response to your first question. As stated previously, the permit applicant may be required to report the amount paid to ERS for preparing the document if certain conditions are met. However, your presence at a meeting does not, in and of itself, convert the EIA into a "lobbyist document."

> **"c) Suppose the client does not request our presence in meetings but the agency staff does because they want to know what we think about a permit or policy question. Is this lobbying? If so, do we have responsibility to report the contact, or do the state employees who asked for our opinions? A related question is whether service on an advisory board with state officials constitutes lobbying if the person so serving is paid a salary, per diem, or travel to serve on the board by a third party employer?"**

The lobby act regulates direct communications which are intended to influence public officials. "Influencing" is defined in section 5(3) of the Act as "promoting, supporting, affecting, modifying, opposing or delaying by any means, including the providing of or use of information, statistics, studies, or analysis."

The Act makes no distinction between communications which are freely initiated and those initiated by executive branch officials. If you are paid to communicate with an agency staff member who is a public official and your purpose is to influence the official's administrative action, you are engaged in reportable lobbying activity.

You should be aware, however, that according to section 5(2), set out fully on the first page, "lobbying" does not include the providing of technical information by a person who is not a lobbyist agent or an employee of a lobbyist agent when appearing before an officially convened executive department hearing panel. This exception may exclude some of your communications with officials in the executive branch from the Act's reporting requirements.

If lobbying occurs, any compensation or reimbursement you receive for the activity must be reported by ERS, if ERS is a lobbyist, or included in determining whether ERS has reached the $1,150 or $300 lobbyist threshold. A public official who asks for your opinion has no reporting obligations under the Act.

The responsibilities of an employer whose employee serves on an advisory board were discussed in an interpretive statement issued to Conrad L. Mallett, Jr., and Brian P. Henry, dated April 6, 1984. As explained more fully in the

enclosed statement, members of an advisory board are not considered public officials and, in general, are not engaged in lobbying when carrying out their duties on the board.

> "II. ERS is approached by a state agency which wants a controversial topic studied. ERS staff conduct the study for a fee including data, analysis, and expert opinion. The use of the study is controlled by state officials who decide if or how to modify public policy by choosing a course of action that may refer to our studies. Is this lobbying? If so, who should report it?--ERS or the agency that paid for the work?"

In a declaratory ruling issued to Julia D. Darlow on August 27, 1984, the Department considered the Act's impact upon an advertising company hired to develop and administer an advertising campaign supervised by the Department of Commerce. A copy of this ruling is enclosed for your use. The Department expressed its view that an independent contractor functions in a manner similar to that of a state employee, i.e., the contractor communicates with public officials not by choice but to fulfill its obligations under an existing contract. Therefore, a contractor who communicates with public officials in the course of carrying out the terms of a contract is not engaged in regulated lobbying activity.

It appears the Darlow analysis may be applicable to the situation you describe. However, further information is needed to provide a more definite response.

> "III. The Natural Resources Commission is considering a question of policy. Although ERS has been paid in the past for work by persons or companies who are vitally concerned with the (impact of) the policy in question on their business, no company asks, retains, or pays ERS staff to go and appear to solicit changes in the policy. Even so, ERS staff believe strongly that they have scientifically competent opinion to offer to the discussion and request an opportunity to speak to the NRC which is granted. ERS staff are paid an annual salary from ERS regardless of what projects they work on. The unsolicited testimony is offered and ERS pays its people their normal salary. Is this lobbying? Is this lobbying if the staff member involved takes a leave of absence (no pay) to appear and makes the appropriate disclaimer at the start of the presentation that he or she is only representing personal views?"

Pursuant to section 5(9) of the Act, members of the Natural Resources Commission are public officials who can be lobbied under the statute. However, the Act applies only to paid communications with public officials. As such, regulated lobbying does not occur if an ERS staff person takes a leave of absence and does not receive any compensation or reimbursement for communicating with the Commission.

Other issues raised by your hypothetical are similar to those addressed in the enclosed interpretive statements to Joseph P. Bianco, Jr., dated February 3,

1984, and Rossi Ray Taylor, dated July 13, 1984. As stated in the letter to Mr. Taylor:

> "An employer does not engage in direct, express and intentional communications which are specifically intended to influence a public official's actions simply by paying employees for time which the employees may spend lobbying on behalf of independent associations or organizations. Reportable lobbying occurs only if the employer directs or controls the employee's lobbying activity. Whether the employer exercises direction or control depends upon a variety of factors. For example, paying the employee's membership dues for an organization suggests the employer may have some control over the employee's communication for lobbying."

Although you do not suggest that the ERS employees in your hypothetical are lobbying on behalf of an independent group, the direction and control test described in Taylor appears to be applicable to ERS and its employees. Therefore, in order to answer your questions, communications between salaried ERS employees and the Natural Resources Commission must be examined on a case by case basis to determine whether the communication was directed or controlled by the company. In addition, as stated in the letter to Mr. Bianco, the extent to which the communication affects ERS' interests must be considered to determine whether reportable lobbying occurs.

> "IV. ERS staff in the course of their work build up unique and valuable expertise in an area of controversy or changing policy (e.g. wetland or sand dune ecology). ERS staff sense an unidentified need for studies and research that will benefit agency staff in their roles of regulation development, enforcement and development of policies, and issuance of permits. Is the act of submitting an unsolicited proposal a form of lobbying? Does it become lobbying if the proposal is accepted? Is it lobbying if the state agency pays a fee for the work?"

This hypothetical is, again, too general to provide a specific response. You may wish to review the principles discussed above to determine whether, in these circumstances, the activities of ERS' staff are within the purview of the Act.

Certain points are worthy of emphasis, however. As stated previously, the Act regulates communications with public officials for the purpose of influencing legislative or administrative action. Thus, submitting an unsolicited proposal to a public official with the intent to influence his or her action is a form of lobbying.

It is immaterial whether the public official is persuaded to act in accordance with the lobbyist or lobbyist agent's wishes. The Act focuses upon the intent of the communicator and not upon the effectiveness of the communication. Therefore, a proposal which is given to a public official with the requisite intent is lobbying whether or not the proposal is accepted.

A proposal submitted pursuant to the terms of a contract for which a fee is paid may be excluded from the Act's regulation. Issues relating to communications with public officials in the course of performing a contract are discussed in the response to your second hypothetical.

Your remaining questions arise out of the general relationship between ERS staff members and "policy setting or permit granting staff of state agencies," many of whom are friends or former colleagues. A summary of the salient points made above may assist you in determining the Act's applicability to communications between ERS employees and agency staff members in these circumstances.

First, a communication is subject to the Act only if it is directed towards a public official. According to section 5(9) and the enclosed list, the only public officials in the Department of Natural Resources are the Department director, assistant director and the executive assistant to the Natural Resources Commission. Members of the Natural Resources Commission, the Air Pollution Control Commission and the Water Resources Commission are also considered public officials for purposes of the Act.

Second, the communication must be for the purpose of influencing administrative or legislative action as defined in sections 2(1) and 5(1) of the Act. Administrative action does not include quasi-judicial determinations; most, if not all, permit processes are quasi-judicial in nature and thus are not subject to the Act's requirements. In addition, the provision of technical information by an expert who is not a lobbyist agent when appearing before an officially convened legislative committee or executive department hearing panel is excluded from the definition of "lobbying."

Third, an employee's communications with public officials are reportable only if the employee is compensated or reimbursed by either a third party or ERS. A communication by a salaried employee which is not directed or controlled by ERS is generally not attributable to the company, but it may be if the communication affects ERS' interests.

Fourth, the Act does not differentiate between communications initiated by public officials and those initiated by private individuals. Similarly, no distinction is made between effective and ineffective communications. Any paid communication with a public official which is intended to influence legislative or administrative action is subject to the Act's regulation.

Fifth, both a lobbyist and lobbyist agent are required to report expenditures in the following categories: 1) expenditures for food and beverage provided to public officials; 2) advertising and mass mailing expenses directly related to lobbying; and 3) all other expenditures for lobbying. Compensation or reimbursement paid to a lobbyist agent is reported by the lobbyist as an expenditure for lobbying and not by the lobbyist agent.

Finally, it should be noted that unlike the other categories, there is no purpose test attached to food and beverage expenditures. If a lobbyist or lobbyist agent provides food and beverage to a public official for a non-lobbying purpose, the expenditure must be reported pursuant to section 8(2) of the Act.

This response is informational only and does not constitute a declaratory ruling. If you have further questions regarding the Act's reporting requirements, please contact the Department's Elections Division, Fourth Floor, Mutual Building, 208 N. Capitol, Lansing, Michigan 48918, (517) 373-2540.

Very truly yours,

Phillip T. Frangos
Director
Office of Hearings and Legislation

PTF/AC/cw

Enc.

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

LANSING
MICHIGAN 48918

32-84-LI

July 13, 1984

Rossi Ray Taylor, Director
Legislative and Community Relations
Lansing School District
519 W. Kalamazoo Street
Lansing, Michigan 48933

Dear Mr. Taylor:

This is in response to your inquiry concerning applicability of the lobby act (the "Act"), 1978 PA 472, to the Lansing School District and its employees.

Specifically, you indicate that certain employees are officers or members of independent educational associations and professional organizations. As officers or members, they frequently lobby on behalf of the associations and organizations. Some of the lobbying occurs on "company time," that is while the employees are compensated by the School District. You ask whether the School District, itself a lobbyist, is required to "register these individuals as lobbyist agents or to report their activity." For purposes of discussion, it is assumed the employees do not receive compensation or reimbursement for lobbying from the associations or organizations.

Pursuant to section 8(1) of the Act (MCL 4.418), a lobbyist is required to report all of its "expenditures for lobbying," including compensation or reimbursement paid to its employees for that portion of time devoted to lobbying. According to sections 5(5) and 7(2) of the Act (MCL 4.415 and 4.417), an employee who is compensated or reimbursed more than $250 in any 12 month period "for lobbying" must register as a lobbyist agent. Consequently, the School District and its employees are subject to the Act's reporting requirements only if the compensation or reimbursement paid to the employees is "for lobbying."

"Lobbying" is defined in section 3(2) of the Act as "communicating directly with an official in the executive branch of state government or an official in the legislative branch of state government for the purpose of influencing legislative

or administrative action." According to section 5(3), "influencing" includes "promoting, supporting, affecting, modifying, opposing or delaying by any means."

In Pletz v Secretary of State, 125 Mich App 335 (1983), plaintiffs argued the definitions of "lobbying" and "influencing" were unconstitutionally vague and ambiguous. The Court of Appeals, in rejecting plaintiffs' contention, suggested the key factor in determining whether a communication is for lobbying is whether the communication is "for the purpose of influencing." The Court cited with approval a New Jersey case which defined the phrase "to influence legislation":

> "' . . . we conclude that the meaning to be ascribed to this terminology is activity which consists of direct, express, and intentional communications with legislators undertaken on a substantial basis by individuals acting jointly for the specific purpose of seeking to affect the introduction, passage, or defeat of, or to affect the content of legislative proposals.'" 125 Mich App at 130

Thus, "lobbying", as viewed by the Court of Appeals, consists of direct, express and intentional communications with public officials for the specific purpose of affecting legislative or administrative action.

An employer does not engage in direct, express and intentional communications which are specifically intended to influence a public official's actions simply by paying employees for time which the employees may spend lobbying on behalf of independent associations or organizations. Reportable lobbying occurs only if the employer directs or controls the employee's lobbying activity. Whether the employer exercises direction or control depends upon a variety of factors. For example, paying the employee's membership dues for an organization suggests the employer may have some control over the employee's communication for lobbying.

In answer to your question, the Lansing School District is not required to report compensation or reimbursement paid to an employee for time the latter spends for lobbying on behalf of an educational association or professional organization which is not affiliated with the School District. This is true provided the School District has no direction or control over the employee's lobbying effort. Similarly, an employee under these circumstances is not required to register as a lobbyist agent for the School District.

On the other hand, if the School District directs or controls its employee while lobbying for the association or organization, Lansing School District must report the compensation paid to the employee as an expenditure for lobbying. In addition, an employee who receives compensation or reimbursement in excess of $250 in a 12 month period from the School District in this situation must register as a lobbyist agent and file periodic disclosure reports as required by the Act.

This response is informational only and does not constitute a declaratory ruling.

Very truly yours,

Phillip T. Frangos
Director
Office of Hearings and Legislation

PTF/cw

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

LANSING
MICHIGAN 48918

9-84-LI

February 7, 1984

Dr. Martha Bigelow
Director
Michigan History Division
Third Floor, Mutual Building
Lansing, Michigan 48918

Dear Dr. Bigelow:

This is in response to your inquiry concerning the applicability of the lobby act (the "Act"), 1978 PA 472, to the participation of Department of State personnel in the Friends of the Capitol (the "Friends").

You indicate you, Kathryn Eckert (the Historic Preservation Supervisor), and Brian Conway (Historical Architect) are involved with the Friends. You serve on the Board of Trustees, Ms. Eckert is Treasurer and serves on the Executive Committee, and Mr. Conway serves on the Preservation Committee. All three of you support the Friends at least partly because of your employment with the Department. The Capitol is a building of historical significance to Michigan. While you might volunteer your time if you did not work in the History Division, there would always be representatives of the History Division participating in the Friends.

A lobbyist is a person whose expenditures for lobbying exceed a threshold, and a lobbyist agent is a person who is compensated or reimbursed for lobbying in excess of $250.00 in a twelve month period. Lobbyists must report expenditures, and lobbyist agents must report compensation and reimbursement. Once your total compensation and reimbursement for lobbying from all sources exceeds $250.00 in twelve months, you must register as a lobbyist agent and file biannual reports. Similarly, the person who compensates or reimburses you for lobbying (the Department or the Friends) becomes a lobbyist and must report the compensation or reimbursement once it spends in a twelve month period more than $250.00 lobbying a single public official or $1,000.00 for all lobbying.

Volunteer lobbying efforts where the person doing the lobbying is not compensated or reimbursed is not counted toward the lobbyist or lobbyist agent thresholds and is not reported. To the extent you lobby on your own time, and are not reimbursed for expenses, and do not spend your own money lobbying (other

than the cost of travel), you do not need to keep records or report your lobbying activities. However, when you lobby for the Department, are compensated for your time by the Friends, or are reimbursed for your expenses by the Department or the Friends, records and reports of your activity must be made. Compensation and reimbursement for lobbying includes time spent directly communicating with public officials and time spent preparing for the direct communication.

You, Ms. Eckert, and Mr. Conway are all professional, salaried employees of the Department of State. As such, you are not eligible for overtime pay and are expected to perform your job outside normal business hours, if necessary. Therefore, if you are a lobbyist agent for the Department, all lobbying consistent with your position in the Department is compensated lobbying time. You cannot lobby after normal business hours and consider it voluteered time. The important issue is whether you or your employees are lobbyist agents for the Department. Once you are, you are recognized as an official spokesperson for the Department before public officials.

In actuality, none of you is a registered lobbyist agent for the Department. The Department has made a conscious decision to concentrate its lobbying efforts in as few employees as possible. Because you are not an official spokesperson for the Department, at least for the purpose of relaying the Department's position to public officials, lobbying activities are not duties for which you are compensated by the Department. As lobbying is not part of your job, you are able to volunteer your time to lobby for outside organizations, such as the Friends. To lobby for the Friends without your activity being reportable by the Department, you must do all of the following:

1) Lobby outside normal working hours or take annual leave for the time you lobby.

2) Identify yourselves as board members of the Friends.

3) Not identify yourselves as employees or representatives of the Department or the History Division.

4) If the public official is aware of your employment by the Department, expressly state that you are not espousing the Department's position.

5) Limit your communication with the public official to the business of the Friends.

Of course, you may choose the simpler method of absenting yourselves from any direct communication with public officials or preparation of materials used to directly communicate with public officials.

This response is informational only and does not constitute a declaratory ruling.

Very truly yours,

Phillip T. Frangos
Director
Office of Hearings and Legislation

PTF/cw

1-89-LI

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

LANSING
MICHIGAN 48918

March 31, 1989

Robert Brown, Jr., Director
Department of Corrections
P.O. Box 30003
Lansing, Michigan 48909

Dear Mr. Brown:

This is in response to your inquiry concerning the applicability of the lobby act (the Act), 1978 PA 472, as amended, to contacts between Department of Corrections employees and various state legislators. Specifically, you ask whether a staff member's contact with a legislator who is visiting an institution is considered lobbying which must be reported under the Act.

Pursuant to sections 5(5) and (7) of the Act (MCL 4.415), an employee of a state executive department is a "lobbyist agent" if the employee is compensated or reimbursed more than $375.00 in any 12 month period for lobbying. (The original monetary amount of $250.00 has been adjusted annually as required by section 19a of the Act [MCL 4.419].) The definition of "lobbying", set out in section 5(2), includes direct communications with a member of the Legislature for the purpose of influencing legislative action. "Legislative action" and "influencing" are defined as follows:

> "Sec. 5. (1) 'Legislative action' means introduction, sponsorship, support, opposition, consideration, debate, vote, passage, defeat, approval, veto, delay, or an official action by an official in the executive branch or an official in the legislative branch on a bill, resolution, amendment, nomination, appointment, report, or any matter pending or proposed in a legislative committee or either house of the legislature. Legislative action does not include the representation of a person who has been subpoenaed to appear before the legislature or an agency of the legislature."

* * *

> "(3) 'Influencing' means promoting, supporting, affecting, modifying, opposing or delaying by any means, including the providing of or use of information, statistics, studies, or analysis."

As these definitions indicate, the Act does not regulate all contacts or communications with legislative officials. Although an employee may provide information or advance an opinion during a legislator's visit to an institution, reportable lobbying occurs only if the employee directly communicates with the legislator for the purpose of influencing an action described in section 5(1). If the communication is not for the purpose of influencing legislative action, neither the employee nor the Department of Corrections is required to file a disclosure report under the Act. However, if a communication is lobbying as defined in the Act, it is immaterial whether the communication is initiated by the public official or by the employee.

The Department is unable to provide a more specific response because your inquiry does not include a concise statement of facts. However, enclosed for your benefit are copies of letters to Dr. Martha Bigelow dated February 7, 1984, and Mr. Rossi Ray Taylor, dated July 13, 1984, which may further clarify the Act's application to the employer-employee relationship.

This response is informational only and does not constitute a declaratory ruling.

Very truly yours,

Phillip T. Frangos, Director
Office of Hearings and Legislation

PTF:cw:rlp
attachments

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

LANSING
MICHIGAN 48918

5-84-LI

January 31, 1984

James S. Mickelson, ACSW
Executive Director
Michigan Association of Children's Alliances
P.O. Box 20247, Suite 739
111 S. Capitol Avenue
Lansing, Michigan 48901

Dear Mr. Mickelson:

This is in response to your request for "clarification of the Lobbyist Registration Act," 1978 PA 472 (the "Act"). You indicate that "Regulations point out that no gift valued at $25.00 or more can be given to a legislator or public policy making official." You state it is customary for your Association to present a "Legislator of the Year Award" to a legislator whom you feel has done outstanding work in legislation which pertains to children and families. You indicate that this award has in the past consisted of "recognition . . . through (your) newsletter and . . . a plaque (for which you paid) . . . $35-$40." The plaque contains a statement that the legislator has received the "Legislator of the Year" award. You wonder if such plaque is a "gift" or whether the practice may continue after the implementation of the Act.

"Gift" is defined in section 4 of the Act (MCL 4.414) as:

> " . . . a payment, advance, forbearance, or the rendering or deposit of money, services, or anything of value, the value of which exceeds $25.00 in any 1-month period, unless consideration of equal or greater value is received therefor . . . ."

A number of exclusions from this definition may be found at section 4(1)(a) - (e), but are not helpful in resolving the question you present.

Clearly the definition of "gift" as used in the Act contemplates that the particular item have an intrinsic value in and of itself. The type of plaque you describe is a symbolic citation or award based upon merit as determined by your

organization. Clearly it was not the intent of the Act to discourage symbolic recognition of commendable public service. Therefore, while the plaque you describe may have cost more than $25.00, its intrinsic value is substantially less, and therefore it is the department's belief that awards should not be classified as gifts unless the intrinsic or actual value is $25.00 or more.

One possible test could be the value of the plaque in the open market, i.e., could the recipient sell it for more than $25.00? The type of plaque you describe, although costing more than $25.00, could most likely not be sold for more than $25.00 and, therefore, is not a gift. Should a "plaque" consist of an item with intrinsic value clearly greater than $25.00, the item will be considered as being a gift, the donation of which is prohibited by section 11(2) of the Act.

The above is not a declaratory ruling because no such ruling was requested.

Very truly yours,

Phillip T. Frangos
Director
Office of Hearings and Legislation

PTF/cw

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

2-89-LI

LANSING
MICHIGAN 48918

June 29, 1989

Honorable Philip E. Hoffman
State Representative
State Capitol
Lansing, Michigan 48913

Dear Representative Hoffman:

This is in response to your inquiry regarding the applicability of the lobby act (the Act), 1978 PA 472, as amended, to an item you received from the Pheasant Forever organization of Jackson County. Specifically, you indicate the organization gave you a mounted 3/4 Sichuan-Ringneck pheasant which you believe has a monetary value in excess of $50.00. You ask whether it is necessary to make a declaration of this gift.

Pursuant to section 11(2) of the Act (MCL 4.411), a lobbyist or lobbyist agent or anyone acting on behalf of a lobbyist or lobbyist agent is prohibited from giving a gift to a public official. For the year 1989, "gift" is defined as anything of value which exceeds $33.00 in a one month period. In an interpretive statement issued to James S. Mickelson on January 31, 1984, the Department concluded that this section did not apply to a symbolic citation or award unless its intrinsic or actual value exceeds the dollar limitation of section 4(1) of the Act (MCL 4.404). (In 1984, the limit was $25.00.) A copy of the Mickelson letter is attached for your convenience.

However, the Department's records indicate that the Pheasant Forever organization is not registered as a lobbyist or lobbyist agent. Therefore, the organization was not prohibited from giving the mounted pheasant to you regardless of its actual value. On the other hand, if the pheasant was given to you for the purpose of lobbying, the value of this item must be considered to determine whether Pheasant Forever is now subject to the Act's registration requirements.

"Lobbying" is defined in section 5(2) of the Act (MCL 4.415) as follows:

> "Sec. 5. (2) 'Lobbying' means communicating directly with an official in the executive branch of state government or an official in the legislative branch of state government for the purpose of influencing legislative or administrative action. Lobbying does not include the providing of technical information by a person other than a person as defined in subsection (5) or an employee of a person as defined in subsection (5) when appearing before an officially convened legislative committee or executive department hearing panel. As used in this subsection, 'technical information' means empirically verifiable data provided by a person recognized as an expert in the subject area to which the information provided is related."

Pursuant to section 5(4), a person whose expenditures for lobbying are more than $1,300 in any 12 month period, or more than $375 if the amount is expended on a single public official, is required to register as a lobbyist under the Act.

The Act's reporting requirements are set out in section 8 (MCL 4.418). This section requires a lobbyist or lobbyist agent to file an annual report disclosing his or her expenditures for food and beverage, advertising and mass mailing expenses directly related to lobbying, and "all other expenditures for lobbying". An item given to a public official for the purpose of lobbying which is not a prohibited gift would be reported in the latter category by the lobbyist or lobbyist agent. However, the Act does not require the public official who received the item to file any report or declaration.

This response is informational only and does not constitute a declaratory ruling.

Very truly yours,

Phillip T. Frangos, Director
Office of Hearings and Legislation

PTF:cw:rlp
attachment

3-89-LI

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

LANSING
MICHIGAN 48918

November 9, 1989

John D. Pirich
Timothy Sawyer Knowlton
Honigman Miller Schwartz and Cohn
1400 Michigan National Tower
Lansing, Michigan 48933

Dear Messrs. Pirich and Knowlton:

This is in response to your request for an interpretive statement under the lobby act (the "Act"), 1978 PA 472, as amended. You indicate that you provide legal services to several clients who at times become involved in pending legislation or rules which may involve complex technological principles and applications. Your clients occasionally arrange tours for public officials to view structures, factories, equipment or areas which are directly pertinent to pending legislation or rules. The purpose of these tours is to enable public officials to acquire technical information useful to them in the discharge of their public duties.

These tours are often scheduled in out-of-state locations because a particular technology may be used in only one or two facilities nationwide. Your clients wish to provide air transportation to public officials to go on these tours. It is your opinion that providing transportation to public officials does not necessarily constitute a gift within the meaning of section 4 of the Act (MCL 4.414) if there is no intent to give a gift and if the provision of transportation is strictly controlled. You ask whether providing transportation to public officials to enable them to attend fact finding tours is an illegal gift under the Act.

"Gift" is defined in section 4 of the Act as "a payment, advance, forbearance, or the rendering or deposit of money, services, or anything of value, the value of which exceeds $25.00 in any one-month period, unless consideration of equal or greater value is received therefor." (Effective January 1, 1989, the value must exceed $33.00 to be deemed a "gift".) The actual cost of air transportation to attend a fact finding tour will undoubtedly exceed $33.00. However, other provisions of the Act must be considered to determine whether providing transportation in order to give a public official technical information required to discharge the public official's duties is a "gift" and therefore prohibited under the Act.

The Act specifically contemplates that information may be given to public officials as a means of influencing legislative or executive action. Lobbying is defined in section 5(2) of the Act (MCL 4.415(2)) to include "communicating directly with a public official . . . for the purpose of influencing legislative or executive action." Pursuant to section 5(3), "influencing" includes "the providing or use of information, statistics, studies, or analysis." Rule 1(1)(d)(iv) of the administrative rules promulgated to implement the Act, 1981 AACS R4.411 et seq., further states:

> "Rule 1.(1) As used in the act or these rules:
>
> * * *
>
> (d) 'Expenditures related to the performance of lobbying' and 'expenditures for lobbying' includes all of the following expenditures of a lobbyist or lobbyist agent:
>
> * * *
>
> (iv) An expenditure for providing or using information, statistics, studies, or analysis in communicating directly with an official that would not have been incurred but for the activity of communicating directly."

In an interpretive statement issued to former Speaker of the House Gary M. Owen, dated February 7, 1984, the Department indicated that providing information in the form of research and technical material with a value exceeding $25.00 to a public official for use in assessing proposed legislation is an expenditure for lobbying and not a gift. However, your inquiry goes beyond the propriety of giving tangible technical material to a public official and concerns an intangible -- transportation-- which enables the official to acquire information needed to fulfill his or her duties.

Rule 1(1)(d)(iv) is not limited to providing tangible material. The rule expressly pertains to expenditures for "providing or using information." While information may be reduced to a tangible written form, the information itself is intangible. When an expenditure is made to transport a public official to a facility which incorporates advanced technology so as to provide that official with information and influence his or her decision on a pending legislative or administrative matter, that expenditure is for the purpose of "providing . . . information . . . in communicating directly with an official" and is permissible under the Act if certain other conditions are met.

To be deemed an "expenditure for lobbying," Rule 1(1)(d)(iv) further requires that the expenditure "would not have been incurred but for the activity of communicating directly" with a public official. The "but for" language of the rule ensures that expenditures made for transportation are truly for the purpose

of providing information to be used in an attempt to influence legislative or administrative action, rather than an effort to disguise an illegal gift. If the expenditure for transportation would have been incurred in any event, and if the value of this transportation exceeded $33.00, the transportation would be within the meaning of sections 4(1) and 11(2) of the Act. If, on the other hand, the transportation expense would not have been incurred but for the desire to communicate directly with the public official about a pending legislative or administrative matter after that official had acquired the information provided through the tour, the transportation costs may properly be considered "expenditures for lobbying."

The Department has emphasized the underlying legislative intent of the Act in rendering past interpretive statements. For instance, the interpretive statement issued to Mr. Owen states at page 3:

> "In the area of gifts, the public official must always keep in mind the intent of the Act. He/she must not accept ' . . . a payment, advance, forbearance, or the rendering or deposit of money, services or anything of value . . .' in violation of the Act. Gifts that are given to a non-public official where the intent is to benefit the public official are not permitted. Gifts to another person in any amount are allowed if it appears from all the facts that there is no intention to circumvent the Act." (emphasis in original)

In Pletz v Secretary of State, 125 Mich App 335 (1983) plaintiffs contended the "but for" language in Rule 4.411(1)(d)(iv) was beyond the scope of the Secretary of State's rulemaking authority. Plaintiffs argued that the Act does not apply to the expenditures of lobbyists incurred in preparing information or studies that are subsequently communicated to a public official. In responding to this argument, the Michigan Court of Appeals adopted the following statement which appeared in the brief supporting the authority of the Secretary of State to adopt this rule:

> "To eliminate the 'but for' rule, 1(1)(d)(iv), is to eliminate information on a major expenditure. With today's complex society and better educated and more sophisticated public officials, it is information, statistics, studies, and analysis that are major tools of the lobbyists and lobbyist agents' art. When the expenditure for the information, statistics, studies, or analyses would not have been incurred but for the direct communication, the expenditure is as much a part of the direct communication as eyeball to eyeball communication."

The provision of information is a major tool of the art of lobbying. The Act was intended to require lobbyists to disclose information about expenditures they make for lobbying, including expenditures related to providing information to public officials. There is nothing which suggests the Act was intended to preclude lobbyists from providing pertinent information to officials in the

legislative or executive branches. The public is best served when public officials possess as much information as possible upon which to base their judgments. It may be that the best or, indeed, only means of providing information to public officials may require transporting those officials to a particular location to observe facilities incorporating advanced technology.

It therefore appears that the Act does not prohibit a lobbyist or lobbyist agent from furnishing transportation to a public official in connection with an informative tour if the surrounding circumstances indicate there is no intention to circumvent the Act and give an illegal gift. Transportation costs would appear to be an "expenditure for lobbying," rather than a gift, only when the following criteria are met. First, there must be actual operations at the tour site which demonstrate unusual advanced technologies. Second, when there are several sites where the advanced technologies can be observed, the tour site must be the location closest to Lansing. Third, the tours must be planned so that arrival and departure schedules permit no free periods for personal or recreational activities. Fourth, the tour sponsor, rather than the public official, must select the means and times of transportation. Fifth, in accord with Rule 1(l)(d)(iv), the transportation costs would not have been incurred but for the activity of communicating directly with the public official. That is, the real purpose of the transportation costs must be to provide public officials with information in connection with direct communication and not as a subterfuge to give a gift.

Your letter indicates that your clients contemplate using both private and commercial aircraft to provide transportation in connection with informational tours. In the case of private craft, you state that your clients would control both arrival and departure times, and the period between arrival and departure would be limited so that there would be no time for personal recreational activities to occur while on the trip. In the case of a commercial aircraft, a representative of your clients would handle all of the tickets of the public officials involved with the tour to ensure that such an official could not substitute a return ticket for a later flight and engage in personal activities in the vicinity of the tour. When used, commercial flights would be selected with the idea of ensuring that public officials would not have time to engage in personal recreational activities in the vicinity of the tour site. Assuming that there is, in fact, real informational value in the tour, that the tour site is the closest location to Lansing where the operations sought can be seen, and that the tour is not merely a ruse to give public officials a pleasure trip, providing transportation as set forth in this paragraph would be a legitimate "expenditure for lobbying" and not a prohibited "gift."

In conclusion, it must be emphasized that not every instance in which transportation is provided to a public official may be deemed a lawful "expenditure for lobbying" rather than an illegal "gift." If the strict criteria

set forth in this letter are satisfied, however, paying for transportation to provide information to public officials constitutes an "expenditure for lobbying" rather than a "gift" and is permissible under the Act.

This response is informational only and does not constitute a declaratory ruling.

Very truly yours,

Phillip T. Frangos, Director
Office of Hearings and Legislation
(517) 373-8141

PTF/AC/cw

1929211

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

LANSING
MICHIGAN 48918

December 21, 1989

Frederick K. Lowell
PILLSBURY, MADISON & SUTRO
Post Office Box 7880
San Francisco, California 94120

Dear Mr. Lowell:

This is in response to your request for an interpretation of the Michigan Lobby Act (the Act), 1978 PA 472, as amended, to a fact finding tour proposed by your client, Chevron Chemical Company (Chevron). Specifically, you indicate that Chevron proposes to pay for the costs of a four to six day fact finding tour for Michigan legislators to collect technical information relating to a bill pending before the Michigan Legislature. You ask whether Chevron's "sponsorship" of the tour is permissible under the Act.

Section 11(2) of the Act (MCL 4.421) prohibits a lobbyist or lobbyist agent from giving a gift to a public official, including a legislator. "Gift" is defined in section 4 of the Act (MCL 4.414) as "a payment, advance, forbearance, or the rendering or deposit of money, services, or anything of value" if the value exceeds $33.00 ($35.00 in 1990) in a one month period. You indicate that Chevron is not presently a lobbyist as defined in section 5(4) of the statute (MCL 4.415). Therefore, your inquiry regarding the application of the Act to your client seems premature. However, the following general discussion is offered to clarify the interpretive statement issued to John D. Pirich and Timothy Sawyer Knowlton on November 9, 1989, a copy of which is attached for your convenience.

In that interpretive statement, the Department was asked whether providing transportation to public officials to enable them to attend fact finding tours is an illegal gift under the Act. The factual scenario presented by Messrs. Pirich and Knowlton indicated that the tour in question would be carefully planned "so that the public officials would not have time for personal sightseeing or other recreational activities." Further, it was anticipated that "[i]n the great majority of instances . . . a fact finding tour would be completed within a one day period so that it would be unnecessary for the public official to be away overnight." After a careful analysis and in light of these specific limitations, the Department concluded:

> "It therefore appears that the Act does not prohibit a lobbyist or lobbyist agent from furnishing transportation to a public official in connection with an informative tour if the surrounding circumstances indicate there is no intention to circumvent the Act and give an illegal gift. Transportation costs would appear to be an 'expenditure for lobbying,' rather than a gift, only when the following criteria are met. First, there must be actual operations at the tour site which demonstrate unusual advanced technologies. Second, when there are several sites where the advanced technologies can be observed, the tour site must be the location closest to Lansing. Third, the tours must be planned so that arrival and departure schedules permit no free periods for personal or recreational activities. Fourth, the tour sponsor, rather than the public official, must select the means and times of transportation. Fifth, in accord with Rule 1(1)(d)(iv), the transportation costs would not have been incurred but for the activity of communicating directly with the public official. That is, the real purpose of the transportation costs must be to provide public officials with information in connection with direct communication and not as a subterfuge to give a gift."

The Pirich and Knowlton letter was not intended to imply that a fact finding tour of more than one day's duration is permissible under the Act. Such an extended tour would not appear to meet the third criterion identified above because it would necessarily result in free periods of time which could be used for personal or recreational activities. It should also be noted that because the Pirich and Knowlton letter concerned a one day tour, the Department's analysis was limited to transportation costs. There is nothing in the letter which suggests that payments for recreation, entertainment or overnight accommodations made in connection with a fact finding tour are excluded from the prohibition found in section 11(2) of the Act.

This response is informational only and does not constitute a declaratory ruling.

Very truly yours,

Phillip T. Frangos, Director
Office of Hearings and Legislation
(517) 373-8141

PTF/AC/cw/rlp
attachment

1-90-LI

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

LANSING
MICHIGAN 48918

March 8, 1990

John Cavanagh
House of Representatives
242 Roosevelt Building
PO Box 30014
Lansing, Michigan 48909-7514

Dear Mr. Cavanagh:

This is in response to your inquiry regarding the applicability of the lobby act (the Act), 1978 PA 472, as amended, to the following scenario:

> "A 'lobbyist' is sponsoring a conference that is scheduled to last several days. The conference will feature, inter alia, round table discussions (as a presentation to conference attendees) on topics of interest to the 'lobbyist'. Among the topics of interest slated for discussion is an issue of relevance in this state and on which a 'public official' has familiarity. The 'lobbyist' seeks the participation of the 'public official' in one of the round table discussions referred to above. The 'lobbyist' proposes to assume the cost of travel, meals and accommodations for the 'public official'."

You ask whether, in these circumstances, the lobbyist may pay an honorarium to the public official. You also ask "what status under the Lobby Law does the provision of travel, meals and lodging assume".

Rules 1(1)(e) and 73 of the administrative rules promulgated to implement the Act, 1981 AACS R4.411 and R4.473, address honoraria. These rules provide:

Act. The payment of these expenses must be reported by the lobbyist, as indicated in the Ehlers and Owen letters:

> "A lobbyist or lobbyist agent must report any advance payment or reimbursement given to a public official for meals as food and beverage expenditures. The cost of food and beverage provided directly to the public official at the meeting or seminar must also be reported by the lobbyist or lobbyist agent. In general, when the total of the travel expense, lodging expense, and honoraria paid to the public official is $500.00 or more [$725.00 in 1990], the lobbyist or lobbyist agent must also report the total as a financial transaction pursuant to section 8(1)(C) (MCL 4.418)."

Thus, in your hypothetical, if the lobbyist pays an honorarium to a public official to be an integral participant in a round table discussion, or other event, the lobbyist may pay the public official's actual travel, meal and lodging costs if they are directly connected to that event. However, an impermissible gift may result if the lobbyist pays for unconnected travel and lodging costs. Expenditures for food and beverage provided to the official must be reported if the expenditures for that public official exceed the adjusted dollar amount of $35.00 in one month or $275.00 for the calendar year, as required by section 8(2) of the Act. If the total cost of travel, accommodations and the honorarium paid to the official is $725.00 or more, that cost must be reported as a financial transaction pursuant to section 8(1)(c).

This response is informational only and does not constitute a declaratory ruling.

Very truly yours,

Phillip T. Frangos, Director
Office of Hearings and Legislation

PTF/rlp
attachments

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

2-90-LI

LANSING

MICHIGAN 48918

July 16, 1990

Samuel A. Brunelli
Executive Director
American Legislative Exchange Council
214 Massachusetts Avenue, N.E.
Washington, D.C. 20002

Dear Mr. Brunelli:

This is in response to your inquiry concerning a golf tournament held in conjunction with the annual meeting of the American Legislative Exchange Council. Specifically, you indicate the tournament will be sponsored by the R.J. Reynolds Tobacco Company. The cost of the event may exceed $100.00 for each participant. You state:

> "It is our understanding that ethics rules in your state limit gifts to state legislators. Based upon the above information, and because the golf tournament is an integral part of the annual meeting for which legislators have paid a registration fee, we respectfully request that your state ethics board indicate to us in writing that participation in the tournament would not violate your state's gift laws."

The prohibition against giving a gift to a public official is found in the Michigan lobby act (the Act), 1978 PA 472, as amended. This statute is administered by the Secretary of State and not the Board of Ethics.

Section 11(2) of the Act (MCL 4.421) provides that "a lobbyist or lobbyist agent or anyone acting on behalf of a lobbyist or lobbyist agent shall not give a gift or loan" to a public official, including a state legislator. According to records filed with the Bureau of Elections, R.J. Reynolds Tobacco U.S.A. is a registered Michigan lobbyist.

A person who violates section 11(2) is guilty of a misdemeanor if the value of the gift is $3,000 or less, and shall be punished by a fine of not more than $5,000 or imprisonment for not more than 90 days, or both. If the "person" is not an individual, the person shall be fined not more than $10,000.

"Gift" is defined in section 4(1) of the Act (MCL 4.414). This section states, in pertinent part:

> "Sec. 4. (1) 'Gift' means a payment, advance, forbearance, or the rendering or deposit of money, services, or anything of value, the value of which exceeds $25.00 in any 1-month period, unless consideration of equal or greater value is received therefor . . ."

The $25.00 figure has been adjusted annually for inflation pursuant to section 19a of the Act (MCL 4.429a). For 1990, the adjusted dollar amount is $35.00.

There is nothing in section 4(1) or section 11(2) which prohibits a state legislator from participating in a golf tournament. However, pursuant to these sections, a lobbyist or lobbyist agent or a person acting on behalf of a lobbyist or lobbyist agent is prohibited from giving a public official anything having a value which exceeds $35.00 in a one month period, including a tournament entry or greens fee.

This response is informational only and does not constitute a declaratory ruling.

Very truly yours,

Phillip T. Frangos, Director
Office of Hearings and Legislation

PTF:rlp

1-91-LI

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

LANSING
MICHIGAN
48918-2110

September 24, 1991

Ms. Karen Holcomb-Merrill
Executive Director
Common Cause in Michigan
Capitol Hall, Suite 240
115 West Allegan Street
Lansing, Michigan 48933

Dear Ms. Holcomb-Merrill:

This is in response to your request for an interpretive statement under the lobby act (the Act), 1978 PA 472, as amended. Pursuant to rule 4 of the administrative rules promulgated to implement the Act, 1981 AACS R 4.414, the Secretary of State is authorized to issue an interpretive statement upon the request of any person.

You have raised a number of questions concerning honoraria and lobbyist-paid travel. While your specific questions have not previously been addressed, the Department has on several occasions issued interpretive statements concerning these topics. Copies of previous statements issued to John Cavanagh, then Representative Vernon Ehlers and former House Speaker Gary Owen are enclosed for your convenience.

As the enclosed interpretive statements indicate, section 11(2) of the Act (MCL 4.421) and rule 71 of the administrative rules promulgated to implement the Act, 1981 AACS R 4.471, prohibit a lobbyist or lobbyist agent or anyone acting on behalf of a lobbyist or lobbyist agent from giving a gift to a public official. Violation of this section is a misdemeanor if the value of the gift is $3,000 or less and a felony if the value of the gift exceeds $3,000.

"Gift" is defined in section 4(1) of the Act (MCL 4.411) as "a payment, advance, forbearance, or the rendering or deposit of money, services, or anything of value, the value of which exceeds $25.00 in any one-month period, unless consideration of equal or greater value is received therefor." When

adjusted for inflation as required by section 19a of the Act (MCL 4.429a), beginning January 1, 1991, a "gift" is anything having a value which exceeds $35. Pursuant to this definition, a lobbyist or lobbyist agent is generally prohibited from paying for a public official's travel or accommodation costs.

However, expenditures for food and beverage provided to a public official for immediate consumption are specifically excluded from the definition of "gift" by section 4(1)(d). Similarly, rules 1(1)(e) and 73, 1981 AACS R 4.411 and R 4.473, indicate that "gift" does not include the payment of an honorarium as long as consideration of equal or greater of value is given in return. These rules state:

> "Rule 1. (1) As used in the act or these rules:
>
> (e) 'Honorarium' means a payment for speaking at an event, participating in a panel or seminar, or engaging in any similar activity. Free admission, food, beverages, and similar nominal benefits provided to a public official at an event at which he or she speaks, participates in a panel or seminar, or performs a similar service, and a reimbursement or advance for actual travel, meals, and necessary accommodations provided directly in connection with the event, are not payments."
>
> "Rule 73. An honorarium paid directly to a public official by a lobbyist or lobbyist agent shall be considered a gift within the meaning of section 11 of the act when it is clear from all of the surrounding circumstances that the services provided by the public official do not represent equal or greater value than the payment received."

While not clearly stated, rules 1(1)(e) and 73 also allow a lobbyist or lobbyist agent to pay the travel expenses of a public official in connection with the payment of an honorarium without violating the Act's gift prohibition. However, travel and accommodations which are not directly connected with an event in which the public official actively participates and receives an honorarium are not included within the limited exception found in rule 1(1)(e) and remain subject to the Act's general prohibition against lobbyist-paid travel.

A lobbyist or lobbyist agent may also pay a public official's travel costs in a second, very limited situation. In a November 9, 1989, letter to John D. Pirich and Timothy Sawyer Knowlton, the Department interpreted the Act as permitting a lobbyist to pay the transportation costs of a public official in connection with an informative tour or fact finding mission provided the following criteria were met:

> ". . . First, there must be actual operations at the tour site which demonstrate unusual advanced technologies. Second, when

there are several sites where the advanced technologies can be observed, the tour site must be the location nearest to Lansing. Third, the tours must be planned so that arrival and departure schedules permit no free periods for personal or recreational activities. Fourth, the tour sponsor, rather than the public official, must select the means and times of transportation. Fifth, in accord with Rule 1(l)(d)(iv), the transportation costs would not have been incurred but for the activity of communicating directly with the public official. That is, the real purpose of the transportation costs must be to provide public officials with information in connection with direct communication and not as a subterfuge to give a gift."

In these limited circumstances, the Department concluded that the payment of transportation costs would be an expenditure for lobbying as defined in the Act and rule 1(l)(d)(iv) and not a prohibited gift. However, as pointed out in a subsequent letter to Frederick K. Lowell, dated December 21, 1989, the Pirich and Knowlton analysis was limited to the costs of transportation and did not suggest that the lobbyist could also pay for recreation, entertainment or overnight accommodations for a public official.

Turning to your questions, you first ask whether the five part test employed in the Pirich and Knowlton letter applies where a lobbyist pays an honorarium to a public official to speak at a conference. Specifically, you ask whether the lobbyist must "plan the arrival and departure schedule of a public official speaking at an in-state or out-of-state conference in such a manner so as to permit no free periods" for personal or recreational activities. In a related question, you ask whether a lobbyist is prohibited from paying for "several days of accommodations at a conference for a public official when that public official's portion on the conference program amounts only to a few hours."

Unlike an informational or fact finding tour, the travel costs paid by a lobbyist or lobbyist agent in connection with the payment of an honorarium are specifically addressed in rule 1(l)(e). As previously indicated, that rule permits a lobbyist to "pay for actual travel, meals, and necessary accommodations provided directly in connection with the event." This exception to the Act's general prohibition against lobbyist-paid travel is very limited. It does not allow a lobbyist or lobbyist agent to pay for unconnected or unnecessary travel or accommodations, nor does it allow a lobbyist or lobbyist agent to pay for a public official's personal or recreational activities if the value of those activities exceeds $35 in a one month period.

As suggested in the March 8, 1990, letter to John Cavanagh, an impermissible gift will result if the lobbyist pays for travel and lodging costs which are not directly connected or necessary to the public official's active participation in the conference or event. Thus, if a public official is paid an honorarium to give a single speech or participate in a single panel,

several days of accommodations would be unnecessary, and a lobbyist is prohibited from paying for those accommodations by section 11(2). Pursuant to rule 1(1)(e), the lobbyist or lobbyist agent may not pay anything other than actual travel and accommodation costs which are both necessary and directly connected to the service provided by the public official.

Your final question concerns the Act's reporting requirements. Section 8(1) of the Act (MCL 4.418) states that a lobbyist or lobbyist agent must file a disclosure report on January 31 and August 31 of each year. The report must include the lobbyist or lobbyist agent's expenditures for lobbying, advertising and mass mailing expenses, expenditures for food and beverage provided to public officials, and an account of every "financial transaction" entered into during the reporting period.

The application of these reporting requirements to payments made by a lobbyist or lobbyist agent for honoraria, travel, accommodations, and food and beverage provided to a public official who participates in a meeting, conference or similar event has been explained in the interpretive statements issued to Mr. Cavanagh, Representative Ehlers and House Speaker Owen:

> "A lobbyist or lobbyist agent must report any advance payment or reimbursement given to a public official for meals as food and beverage expenditures. The cost of food and beverage provided directly to the public official at the meeting or seminar must also be reported by the lobbyist or lobbyist agent. In general, when the total of the travel expense, lodging expense, and honoraria paid to the public official is $500.00 or more [$700 in 1991], the lobbyist or lobbyist agent must also report the total as a financial transaction pursuant to section 8(1)(c) (MCL 4.418)."

You ask whether calculation of the $700 financial transaction reporting threshold must include the cost of travel, accommodations and meals provided by a lobbyist or lobbyist agent to immediate family members who accompany the public official to the conference or event in which the public official participates. "Immediate family" is defined in section 4(2) of the Act as "a child residing in an individual's household, a spouse of an individual, or an individual claimed by that individual or that individual's spouse as a dependent for federal income tax purposes."

Pursuant to section 3(3) of the Act (MCL 4.413), a "financial transaction" is a "loan, purchase, sale, or other type of transfer or exchange of money, goods, other property, or services for value." Financial transactions must be reported as required by section 8(1)(c). The pertinent provisions of this section require a disclosure report filed by a lobbyist or lobbyist agent to include the following:

> "(c) An account of every financial transaction during the immediately preceding reporting period between the lobbyist or

> lobbyist agent, or a person acting on behalf of the lobbyist or lobbyist agent, and a public official or a member of the public official's immediate family, or a business with which the individual is associated in which goods and services having value of at least [$700] are involved. The account shall include the date and nature of the transaction, the parties to the transaction, and the amount involved in the transaction. . . ."

The apparent purpose of section 8(1)(c) is to disclose financial connections between a lobbyist or lobbyist agent and a public official which could potentially influence the public official's actions. The financial relationship does not have to be related to lobbying in order to be reported. As the Court of Appeals stated in Pletz v Secretary of State, 125 Mich App 335, 357 (1983), when reversing a lower court's ruling that section 8(1)(c) was unconstitutionally overbroad:

> "The trial court held that § 8(1)(c), which requires the reporting of financial transactions of $500 or more between a lobbyist or lobbyist agent and a public official, was overbroad on account of the lack of necessity for the expended funds to relate to communications for the purpose of influencing governmental business. We disagree with this holding, since a transaction between lobbyists and public officials, even where unrelated to a particular policy issue, may affect the recipient's inclination on matters of interest to the lobbyist. We believe that the intent of the act would be thwarted if a transaction between a public official and a lobbyist did not require accountability as long as it supposedly related to a nonlobbying matter."

Just as the reporting requirement is not limited to financial transactions related to lobbying, there is no requirement that the financial transaction directly involve a public official. In the judgment of the Legislature, a financial transaction between a lobbyist or lobbyist agent and a member of a public official's immediate family is just as likely to affect the public official's "inclination on matters of interest to the lobbyist" and must be reported independently, without regard to the public official's actual knowledge of or benefit from the transaction.

As previously indicated, travel and lodging expenses not otherwise prohibited by section 11(2) of the Act are included within the definition of "financial transaction." Consequently, section 8(1)(c) plainly requires a lobbyist or lobbyist agent who pays the travel and accommodation costs of a member of a public official's immediate family to report those costs as a financial transaction if at least $700 is involved. This calculation must also include the cost of food and beverage provided to the immediate family member. (If provided to a public official, expenditures for food and beverage are reported separately and not as part of the financial transaction.)

The issue raised by your inquiry is whether the travel and accommodation costs paid by a lobbyist or lobbyist agent for a public official and the travel, accomodation and meal costs paid by the lobbyist or lobbyist agent for the public official's immediate family should be combined when calculating the $700 reporting threshold, or whether there is a separate $700 threshold for the public official and each family member.

Section 8(1)(c) requires an account of every financial transaction between a lobbyist or lobbyist agent and a "public official or a member of the public official's immediate family." While one could argue that use of the disjunctive "or" suggests separate calculations for the public official and each member of his or her family, the courts have repeatedly stated that "or" may be read as "and" in order to give effect to the Legislature's intention. Elliott Grocer Co v Field's Pure Food Market, Inc, 286 Mich 112 (1938); Aikens v Department of Conservation, 387 Mich 495 (1972).

The Legislature clearly determined that any financial transaction of $700 or more between a lobbyist or lobbyist agent and a public official's immediate family member could potentially influence the public official and must therefore be reported. The intent to fully disclose such potential influence would be seriously undermined if a lobbyist could avoid reporting travel and accommodation costs by creating an artificial distinction between travel costs paid for a public official and travel costs paid so that the official's family could accompany the official to the same event. Therefore, in answer to your question, the travel and accomodation costs paid by a lobbyist or lobbyist agent for a public official and the travel, accomodation and meal costs paid for members of the public official's immediate family must be combined when determining whether the $700 threshold for reporting a financial transaction has been met.

This response is for information and explanatory purposes only and does not constitute a declaratory ruling.

Very truly yours,

Phillip T. Frangos
Deputy, State Services

PTF:cw
attachments

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MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

LANSING
MICHIGAN 48918
48918-2110

July 29, 1992

Karen Holcomb-Merrill
Executive Director
Common Cause in Michigan
109 East Oakland
Lansing, Michigan 48906

Dear Ms. Holcomb-Merrill:

This is in response to your inquiry regarding the application of the lobby act (the Act), 1978 PA 472, as amended, to lobbyists and lobbyist agents who provide public officials with tickets and transportation to sporting events. Specifically, you indicate the following:

> "Common Cause has knowledge and belief that a number of associations and corporations, which are lobbyists under the Michigan Law, own or lease boxes at the Palace of Auburn Hills, the site of Detroit Piston basketball games.
>
> It is our understanding that public officials in Michigan have accepted invitations to attend sporting events, like Detroit Piston basketball games, as the guests of lobbyist agents employed by either corporations, associations or multi-client lobbying firms."

You ask how a ticket admitting a public official to a private box at a stadium or arena should be valued "since an individual ticket to a private box is not sold to the general public at the box office." You also ask how transportation should be valued if a lobbyist agent transports one or more public officials in a chartered limousine or bus or in the lobbyist agent's private vehicle.

The value of the ticket and transportation is significant because section 11(2) of the Act (MCL 4.421) prohibits a lobbyist or lobbyist agent from giving a gift to an official in the legislative or executive branch of state government. Pursuant to sections 4(1) and 19a of the Act (MCL 4.414(1); MCL 4.429a), "gift" means anything having a value which exceeds $36.00 in any one month period.

The preliminary issue raised by your inquiry is whether the value of the ticket and transportation should be combined when calculating whether the monetary threshold established by sections 4(1) and 19a has been met. This issue has not been previously addressed. However, with respect to financial

transactions, the Department has consistently stated that certain expenditures must be combined to determine whether a particular exchange is a reportable financial transaction.

"Financial transaction" is defined in section 3(3) of the Act (MCL 4.413) as a "loan, purchase, sale, or other type of transfer or exchange of money, goods, other property, or services for value." Pursuant to section 8(1)(c) (MCL 4.418) and section 19a, any financial transaction having a value of at least $725 between a lobbyist or lobbyist agent and a public official or a member of the public official's immediate family must be reported.

The Department has indicated that when a lobbyist or lobbyist agent pays an honorarium and travel costs for a public official to participate in an event, the cost of the honorarium, travel and lodging must be combined to determine if the financial transaction reporting threshold has been met. (Interpretive statements issued to John Cavanagh, March 8, 1990; then Representative Vernon Ehlers, January 27, 1984; and former Speaker Gary Owen, February 7, 1984.) In an interpretive statement issued to you on September 24, 1991, the Department indicated that travel costs paid by a lobbyist or lobbyist agent on behalf of a member of the public official's immediate family who accompanies the official to a speaking engagement or similar event must be included in this calculation. The interpretive statement explains that the Act does not provide for separate reporting thresholds:

> "The Legislature clearly determined that any financial transaction of $700.00 [in 1991] or more between a lobbyist or lobbyist agent and a public official's immediate family member could potentially influence the public official and must therefore be reported. The intent to fully disclose such potential influence would be seriously undermined if a lobbyist could avoid reporting travel and accommodation costs by creating an artificial distinction between travel costs paid for a public official and travel costs paid so that the official's family could accompany the official to the same event. Therefore, in answer to your question, the travel and accommodation costs paid by a lobbyist or lobbyist agent for a public official and members of the public official's immediate family must be combined when determining whether the $700.00 threshold for reporting a financial transaction has been met."

Unlike financial transactions, which are permissible but must be reported, gifts from lobbyists and lobbyist agents to public officials are prohibited and subject to criminal penalties. This prohibition cannot be avoided by attempting to create a similar artificial distinction between the cost of a ticket and the cost of transportation to the same event. Therefore, a lobbyist or lobbyist agent may not provide a ticket and transportation to an event if the combined value of the ticket and transportation exceeds $36.00.

Turning to your questions, you first ask how the value of a ticket admitting a person to a private stadium or arena box should be determined. The Department has been unable to obtain information regarding the value of tickets assigned to owners of suites in the Palace of Auburn Hills. However, the value of a

ticket admitting a person to a private suite is clearly greater than a ticket available to the public.

A ticket sold to the public simply admits the ticket holder to the event. A person holding a ticket to a private suite is not only admitted to the event, but the ticket holder has exclusive access to a private area of the arena. The private ticket holder then enjoys amenities not available to others in the arena. Therefore, absent specific information regarding the value of tickets assigned to suite holders, a ticket to a suite should be assigned the ticket price of the most expensive ticket available to the public.

Your second question is whether the value of a ticket given to a public official by a lobbyist agent can be allocated to the number of lobbyists the agent is representing. Section 11(2) prohibits both lobbyists and lobbyist agents (or anyone acting on their behalf) from giving a gift to a public official. It does not matter who paid for the gift; a lobbyist agent may not give anything valued in excess of $36.00 to a public official. Therefore, the value of an item cannot be allocated between the lobbyists or clients a lobbyist agent represents.

Allocation of an item's value is permissible, however, when the same item is given to two or more individuals. As explained in an interpretive statement issued to Speaker Owen on February 7, 1984:

> "Where a gift is given to more than one person which includes a public official, i.e., a public official and spouse, then the gift will be deemed to be shared equally among all members of the group and the 'share' of the public official must not be of value exceeding [$36.00] in any 1-month period."

This principle also applies to an item given to two or more public officials. Therefore, in answer to your third question, if a lobbyist agent charters a limousine or bus, the cost of the limousine or bus is allocated to the number of public officials transported to the event. If the value of each public official's allocated share of the transportation cost is more than $36.00, the provision of transportation is prohibited.

Finally, you ask how the value of transportation should be determined if the lobbyist agent uses his or her own vehicle. If the lobbyist agent is reimbursed for the trip, the actual amount of the reimbursement is allocated to the number of officials for whom transportation is provided. If there is no reimbursement, it is reasonable to use the Internal Revenue Service standard mileage rate for business deductions (currently 27.5 cents per mile) to ascertain the value of this transportation and divide that total by the number of officials transported to the event.

It should be noted that if one or more items are provided to a single public official, the total value of the exchange may not be allocated if the public official directs or controls the subsequent disposition of the item. For example, if four $10.00 tickets are given to a single public official and the official controls the subsequent use of the tickets, the benefit and thus

value of the item given to the official is $40.00. In these circumstances, the cost of the tickets cannot be allocated to other persons, and a lobbyist or lobbyist agent is prohibited from giving the tickets to the public official.

This response is informational only and does not constitute a declaratory ruling because a ruling was not requested.

Very truly yours,

Phillip T. Frangos
Deputy Secretary of State
State Services

STATE OF MICHIGAN

1-96-LI

CANDICE S. MILLER, Secretary of State
MICHIGAN DEPARTMENT OF STATE
LANSING, MICHIGAN 48918

February 20, 1996

Mr. Jeffrey H. Miro
Miro, Miro & Weiner
500 North Woodward Avenue, Suite 100
Post Office Box 908
Bloomfield Hills, Michigan 48303-0908

Dear Mr. Miro:

This is in response to your request for a ruling concerning the applicability of the Lobby Act (the Act), 1978 PA 472, as amended, to legal services provided by a law firm which is registered as a lobbyist agent under the Act to a public official, his or her immediate family, or a business with which such person is associated.

You ask whether a law firm registered as a lobbyist agent must disclose financial transactions in the form of legal services provided to a public official, the immediate family of a public official, and a business associated with a public official or a public official's immediate family.

General Conclusion

- A law firm registered as a lobbyist agent under the Act must account for every financial transaction between the law firm and a public official, a member of the immediate family of a public official, or a business associated with a public official or a member of the immediate family of a public official, including legal services provided to such persons.

Facts

Miro, Miro & Weiner (the Law Firm) is a registered lobbyist agent under the Act. The Law Firm may provide legal services to a public official, to a member of the immediate family of a public official, or to a business associated with a public official or a member of the immediate family of a public official. The legal services would be provided in the ordinary course of business of the Law Firm, and the person would pay fair market value for the legal services rendered.

Discussion

Section 5(5) of the Act, MCL 4.415, provides:

> "(5) 'Lobbyist agent' means a person who receives compensation or reimbursement of actual expenses, or both, in a combined amount in excess of $250.00 in any 12-month period for lobbying."

Section 8(1) of the Act, MCL 4.418, requires lobbyists and lobbyist agents to file reports with the Secretary of State which include accounts of financial transactions involving public officials. Subsection 8(1)(c) of the Act provides in pertinent part:

> "Sec. 8. (1) A lobbyist or a lobbyist agent shall file a signed report in a form prescribed by the secretary of state under this section. . . The report . . . shall include the following information:
>
> * * *
>
> "(c) An account of every financial transaction during the immediately preceding reporting period between the lobbyist or lobbyist agent, or a person acting on behalf of the lobbyist or lobbyist agent, and a public official or a member of the public official's immediate family, or a business with which the individual is associated, in which goods and services having value of at least $775.00, or travel and lodging expenses paid for or reimbursed to a public official in connection with public business by that public official in excess of $500.00, are involved. The account shall include the date and nature of the transaction, the parties to the transaction, and the amount involved in the transaction. This subdivision does not apply to the following:
>
> "(I) A financial transaction in the ordinary course of the business of the *lobbyist*, if the primary business of the lobbyist is other than lobbying, and if consideration of equal or greater value is received by the lobbyist.
>
> "(ii) A financial transaction undertaken in the ordinary course of the *lobbyist's* business, in which fair market value is given or received for a benefit conferred." (Emphasis and italics added.)

(A) Statutory Construction

The plain language of subsection 8(1)(c) requires both lobbyists and lobbyist agents to file lobby reports giving an account of financial transactions with public officials, their immediate family, or businesses with which they or their immediate family are associated.

Just as plainly, subdivisions (I) and (ii) of subsection 8(1)(c) exempt for the reporting requirement certain financial transactions undertaken in the ordinary course of the lobbyist's business. These two subdivisions are remarkable only in their explicit reference to the ordinary business of a lobbyist but not to the ordinary business of a lobbyist agent.

The Act distinguishes between two types of lobbying entities: a "lobbyist" and a "lobbyist agent". In the most basic sense, a "lobbyist" is a person who makes an expenditure for lobbying, i.e., an expenditure to communicate directly with a public official for the purpose of influencing legislative or administrative action, whereas, a "lobbyist agent" is a person who is compensated or reimbursed for lobbying.

You contend that the failure to explicitly include an exemption for financial transactions in the ordinary course of a lobbyist agent's business is either inadvertent or incongruous. However, a close examination of the Act and its predecessors indicates the exclusion was intentional and purposeful.

One of the main purposes of this dichotomy is to allow differentiation in regulation. Historically, the particular concern of the Legislature has vacillated between the activities of lobbyists and lobbyist agents.

The Act's progenitor was 1947 PA 214, entitled, "AN ACT to license *legislative agents*, and to regulate their activities . . ." (Italics added.) Section 1 of this act provided:

> "Sec. 1. The term "legislative agent" as used in this act shall be construed to mean a person who is employed...to engage in promoting, advocating, or opposing any matter before either house of the legislature or any committee thereof, or . . . which might legally come before either house of the legislature or any committee thereof." (Emphasis added.)

Section 7 of the progenitor lobby law was the original antecedent of section 8(1) of the Act and provided in pertinent part:

> "Sec. 7. Any legislative agent who, in his capacity as such, has any financial transaction with any member of the legislature, shall...file a sworn statement with the secretary of state giving in detail the nature of the transaction together with the name of the member of the legislature." (Emphasis added.)

Under section 7 of the progenitor lobby law, a legislative agent was not required to report a financial transaction with a legislator, if the financial transaction was not related to his

capacity as a legislative agent. This exception is the precursor of subdivisions 8(1)(c)(I) and (ii) of the Act, but applied only to a legislative agent, which was the original antecedent of "lobbyist agent" under the Act. Under the progenitor lobby law, it was the lobbyist/legislative agent which was of particular concern to the Legislature. In this regard, it is particularly noteworthy that the progenitor lobby law neither recognized nor regulated a "lobbyist".

The progenitor lobby law was replaced by 1975 PA 227, which defined, regulated, and distinguished between "lobbyist" and "lobbyist agent". But this act required reports to be filed only by lobbyists and not by lobbyist agents. Section 143(1)(c) of this act was the direct antecedent of subsection 8(1)(c) of the Act:

> "Sec. 143. (1) A lobbyist shall file a signed report . . . The report shall be on a prescribed form and shall include the following information:
>
> * * *
>
> "(c) An account of every financial transaction . . . between the lobbyist, or anyone acting on behalf of the lobbyist, and a public official or a member of the public official's immediate family . . . except a financial transaction in the ordinary course of the lobbyist's business where consideration of equal or greater value is received by the lobbyist. The account shall include the date and nature of the transaction, the parties thereto, and the amount and terms thereof."

[1975 PA 227 was declared unconstitutional in *Advisory Opinion 1975 PA 227*, 396 Mich 123 (1976) and later repealed by 1980 PA 180, but neither action affects this analysis.].

As shown by the foregoing, the Legislature had previous experience with regulating lobbyists and lobbyist agents prior to the Act. The progenitor lobby law regulated only legislative (lobbyist) agents and required them to report financial transactions with public officials, but only when the legislative agent engaged in the financial transaction "in his capacity as [a legislative agent]."

1975 PA 227 regulated both lobbyists and lobbyist agents, but required only lobbyist to file reports of financial transactions with public officials, "except a financial transaction in the ordinary course of the lobbyist's business where consideration of equal or greater value is received by the lobbyist".

The Act regulates both lobbyists and lobbyist agents, and requires both to report financial transactions with public officials. However, the plain language of subdivisions 8(1)(c)(I) and (ii) of the Act excepts from reporting only financial transaction "in the ordinary course of the *lobbyist's* business".

In *People v Hall*, 391 Mich 175, 190 (1974), the Supreme Court declared:

> "This Court will presume that the Legislature of this state is familiar with the principles of statutory construction."

A well-established rule of statutory construction was reiterated by the Court of Appeals in *People v Lange*, 105 Mich App 263, 266 (1981):

> "Under the doctrine of *expressio unius est exclusio alterius*, express mention in a statute of one thing implies the exclusion of similar things."

The financial transaction disclosure exceptions in subdivision 8(1)(c)(I) and (ii) expressly refer to the business of the lobbyist which implies that financial transactions in the ordinary course of the business of the lobbyist agent is excluded from the disclosure exceptions. The rules of statutory construction dictate that the "ordinary course of business' exceptions in subsection 8(1)(c) only apply to financial transactions between lobbyists and public officials and do not apply to financial transactions between lobbyist agents and public officials. Therefore, a lobbyist agent must disclose financial transactions with a public official, a member of the public official's immediate family, or a business with which a public official or a member of the public official's immediate family is associated which meet the threshold amounts prescribed in subsection 8(1)(c) of the Act.

(B) Attorney-Client Privilege

You claim, "[T]he attorney-client privilege protects information regarding legal services provided by us to our clients." You cite *Booth Newspapers, Inc v Wyoming City Council*, 168 Mich App 459, 466 (1988):

> "The purpose of the attorney-client privilege is to allow a client to confide in his or her attorney secure in the knowledge that the communication will not be disclosed. This privilege, which attaches to confidential communications made for the purpose of obtaining legal advice on some right or obligation, may be asserted by either the attorney or the client."

The Court of Appeals has also declared:

> "The scope of the attorney-client privilege is narrow. It attaches only to confidential communications by the client to his adviser which are made for the purpose of obtaining legal advice." *US Fire Ins Co v Citizens Ins Co of America*, 156 Mich App 588, 592 (1986).

Section 8(1)(c) of the Act merely requires the attorney/lobbyist agent to disclose the "date and nature of the [financial] transaction, the parties to the [financial] transaction, and the amount involved in the [financial] transaction."

In your firm's circumstance, the nature of the financial transaction is legal services. The disclosure that the financial transaction between an attorney/lobbyist agent and a public official is in the nature of legal services is not a disclosure of privileged communication, nor is the disclosure that an attorney-client relationship exists between an attorney/lobbyist agent and a public official. Certainly, the amount of the financial transaction (legal fees) is not "confidential communications made for the purpose of obtaining legal advice on some right or obligation."

Even if the disclosure of this information were within the scope of the attorney-client privilege, it must be kept in mind that the privilege is a common law privilege and, therefore, may be modified by statute. There is no question that non-attorney lobbyist agents could raise no similar claim of privileged communication. To this point, I would cite *Pletz v Secretary of State*, 125 Mich App 335, 348 (1983):

> "The act treats attorneys who lobby in an identical manner as non-lawyers."

The Rules of Professional Conduct also support disclosure under the Act. MPRC 1.6(c)(2) provides:

> "(c) A lawyer may reveal:
>
> * * *
>
> "(2) confidences or secrets when permitted or required by these rules, or when required by law or by court order; . . ."

In summary, the attorney-client privilege does not prohibit the disclosure of information regarding legal services provided by an attorney/lobbyist agent to a public official, a member or the immediate family of a public official, or a business with which either is associated.

Since your request did not include sufficient facts to form the basis of a declaratory ruling, this response is an interpretive statement and does not constitute a declaratory ruling.

Sincerely,

Robert T. Sacco

ROBERT T. SACCO
Deputy Secretary of State

RTS:rlp
cc: Patrick Anderson
A. Edwin Dore
Christopher Thomas
Webster Buell